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December 5, 2023

VIA ECF

Hon. Mary Kay Vyskocil
United States District Court
Southern District of New York
500 Pearl Street, Room 2230
New York, N.Y. 10007

Re: *Studio-D v. The Waverly Group, Waverly Staging & Design LLC, Jane Saidenberg and Zoe Diamant; Case No. 1:23-cv-09001-MKV*

**Pre-Motion Letter Seeking Leave to Move to
Dismiss Counts One, Two, Seven, and Eight of the Complaint**

Dear Judge Vyskocil:

We represent the defendants Waverly Staging & Design LLC (“Waverly Staging”) and Jane Saidenberg (“Saidenberg”) in this action. Please accept this Pre-Motion Request, per Rule 4 of Your Honor’s Individual Rules of Practice in Civil Cases, regarding Defendant Saidenberg’s request to file a Rule 12(b)(6) pre-answer motion to dismiss Counts One, Two, Seven, and Eight of the plaintiff Studio – D (“Plaintiff” or “studio D”)’s Complaint (Doc. 2). For sake of brevity, Saidenberg adopts and makes as her own, all the arguments set forth in Waverly Staging’s letter, dated November 30, 2023 (Document 19) with respect to Counts One, Two and Eight of the Complaint, on behalf of herself and adds an additional argument with respect to Count Seven of the Complaint.

Count Seven

Count Seven asserts a claim against individual defendants for “Breach of Fiduciary Duty of Good Faith and Fair Dealing under New York Law.” Under New York law, “parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract.” *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1056 (2d Cir. 1992). New York law, “does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.” *Harris v. Provident Life and Acc. Ins. Co.*, 310 F.3d 73, 81, (2d Cir. 2002).



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As courts do not recognize a cause of action for breach of fiduciary duty of good faith and fair dealing, Count Seven fails to submit a cause of action upon which relief could be based. Accordingly, Defendant Saidenberg seeks permission to move to dismiss Count Seven.

Respectfully submitted,

A handwritten signature in blue ink that reads "Carl M. Perri".

Carl M. Perri

TO: ALL PARTIES VIA ECF